Filed 8/17/12 P. v. Smith CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVION JACQUES SMITH, Defendant and Appellant.	H037669 (Monterey County Super. Ct. No. SS110679)

In the court below, defendant Davion Jacques Smith unsuccessfully moved to suppress evidence. He thereafter pleaded no contest to possession of heroin for sale. On appeal, defendant challenges the ruling on his suppression motion. He contends that the evidence implicating him was the product of an unlawful detention. We disagree and affirm the judgment.

SCOPE OF REVIEW

Where, as here, a suppression motion is made before a magistrate judge in conjunction with a preliminary hearing, the magistrate acts as the trier of fact. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718 (*Laiwa*), superseded by statute on another ground as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223.) Where, as here, the matter is raised a second time in the superior court on the basis of the preliminary hearing transcript, the superior court is bound by the magistrate's factual findings and must accept them so long as they are supported by substantial evidence. (Pen. Code, § 1538.5, subd. (i); *People v. Ramsey* (1988) 203 Cal.App.3d 671, 679.) In such circumstances, the

superior court acts as a reviewing court. In performing this function, the court must respect the magistrate's ability "to judge credibility, resolve conflicts, weigh evidence and draw inferences . . . ." It must also draw "all presumptions in favor of the magistrate's factual" findings and uphold "them if they are supported by substantial evidence." (*People v. Bishop* (1993) 14 Cal.App.4th 203, 214.) On appeal from the superior court's ruling, we are similarly bound by the magistrate's findings. (*People v. Trujillo*, *supra*, at p. 1224.) This court disregards the ruling of the superior court and directly reviews the decision of the magistrate. Thus, we review the magistrate's factual findings to determine whether they are supported by substantial evidence, but independently review the magistrate's determination that the search did not violate the Fourth Amendment. (*Laiwa*, *supra*, at p. 718.)

BACKGROUND

The parties developed undisputed historical facts at the suppression hearing through the testimony of Salinas Police Officer Robert Miller.

Officer Miller was traveling in his patrol car at 12:15 a.m. in a high-crime area when he saw defendant run in front of him. Officer Silva, who was patrolling about a block away, then requested assistance. Officer Miller responded to assist Officer Silva. When Officer Silva no longer needed Officer Miller's assistance, Officer Miller returned to the area where he had seen defendant. He then saw defendant standing on the curb side of a parked pickup truck where his mid-waist and below were out of view. He pulled up alongside the pickup truck and illuminated defendant with his patrol vehicle spotlight. He exited the patrol vehicle, walked to the left side of the pickup truck, and asked defendant, "Can I speak with you?" Defendant asked whether he had done anything wrong. Officer Miller responded, "No," and again asked to speak with defendant. Defendant walked toward the rear of the pickup truck and then around toward Officer Miller. Officer Miller asked defendant whether he was on probation or parole. Defendant replied that he was on parole. Officer Miller then told defendant to have a seat

and show his hands. Defendant did not show his hands and repeatedly reached in his pocket or waistband area. Officer Silva arrived to assist. The officers handcuffed defendant and found heroin and cocaine in the gutter near where defendant had been standing beside the pickup truck.

DISCUSSION

Defendant contends that he was illegally detained because no reasonable suspicion justified the detention. The People reply that the encounter was consensual and therefore did not implicate Fourth Amendment principles. We agree with the People.

"For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police 'contacts' or 'interactions' with individuals, ranging from the least to the most intrusive. First, there are what Justice White termed 'consensual encounters' [citation], which are those police-individual interactions which result in no restraint of an individual's liberty whatsoever--i.e., no 'seizure,' however minimal--and which may properly be initiated by police officers even if they lack any 'objective justification.' [Citation.] Second, there are what are commonly termed 'detentions,' seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police 'if there is an articulable suspicion that a person has committed or is about to commit a crime.' [Citation.] Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime." (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.)

Thus, not every encounter between a law enforcement officer and a citizen constitutes a detention for Fourth Amendment purposes. "[S]eizure does not occur simply because a police officer approaches an individual and asks a few questions." (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) Rather, "a person is 'seized' only when,

by means of physical force or a show of authority, his freedom of movement is restrained." (*United States v. Mendenhall* (1980) 446 U.S. 544, 553.) "[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." (*Florida v. Bostick, supra*, at p. 439; accord, *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.) "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.)

"Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; see also *In re Christopher B.* (1990) 219 Cal.App.3d 455, 460.) All of the circumstances involved in the encounter must be evaluated to decide whether a reasonable person would have concluded from the police conduct that he or she was not free to leave or decline the requests of the police. (*Florida v. Bostick, supra*, 501 U.S. at p. 439.) And "[t]he officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred." (*In re Manuel G., supra*, at p. 821.)

Here, there is no suggestion in the record that Officer Miller coerced defendant to submit to questioning "by means of physical force or a show of authority." (*United States v. Mendenhall, supra*, 446 U.S. at p. 553.) Officer Miller approached defendant in

a public place. It was late at night in a high crime area and Officer Miller presumably used his spotlight to see clearly. The magistrate did not find that the spotlight was used for purposes of intimidation. Relevant authority holds that the use of a spotlight may cause a reasonable person to believe he or she is the object of official scrutiny, but such directed scrutiny does not amount to a detention. (*People v. Perez* (1989) 211 Cal.App.3d 1492, 1496 (*Perez*); *People v. Franklin* (1987) 192 Cal.App.3d 935, 940 (*Franklin*).) Officer Miller then asked defendant whether the two could speak. Defendant implicitly agreed to speak by leaving his position behind the pickup truck and approaching Officer Miller. This scenario shows a consensual encounter that does not implicate Fourth Amendment principles.

Defendant disagrees. He argues that a reasonable person would not feel free to leave because he, subjectively, knew that he was the target of an investigation because (1) he "likely" saw Officer Miller when he ran in front of the patrol car, and (2) Officer Miller illuminated him with the spotlight. But, as we have mentioned, defendant's subjective belief is irrelevant. Defendant nevertheless relies on *People v. Garry* (2007) 156 Cal.App.4th 1100 (*Garry*), and *People v. Roth* (1990) 219 Cal.App.3d 211, in support of his position. Defendant's reliance is erroneous.

In *Garry*, an officer was patrolling a high-crime neighborhood at 11:23 p.m. when he noticed the defendant standing on a street corner next to a parked car. The officer parked his vehicle approximately 35 feet away and observed the suspect for approximately five to eight seconds. He then illuminated the defendant with the patrol car spotlight, exited his vehicle, and walked " 'briskly' " toward the defendant. By the officer's own testimony, he reached the defendant " 'two and a half, three seconds' after leaving his patrol car, during which time defendant referred to living 'right there' and took three or four steps back." The officer then asked if the defendant was on probation, and the defendant affirmed that he was. At that point the officer grabbed the defendant

who actively resisted. The officer then restrained and arrested the defendant. (*Garry*, *supra*, 156 Cal.App.4th at pp. 1103-1104.)

The *Garry* defendant unsuccessfully moved to suppress the evidence seized during a search incident to the arrest. The trial court found that a consensual contact occurred when the officer " 'simply approached' " the defendant and started to speak with him and that the officer had a legal basis to detain the defendant once he admitted that he was on probation. (*Garry*, *supra*, 156 Cal.App.4th at pp. 1103-1104.) On appeal, the court reversed, finding that the only conclusion to be drawn from the undisputed evidence was that the officer's actions "constituted a show of authority so intimidating as to communicate to any reasonable person that he or she was ' "not free to decline [his] requests or otherwise terminate the encounter." ' " (*Id.* at p. 1112.)

The court pointed out that the officer's own testimony established that his conduct was both aggressive and intimidating. (*Garry*, *supra*, 156 Cal.App.4th at p. 1111.) That conduct included (1) bathing the defendant in a spotlight after observing him for only five to eight seconds; (2) walking so " 'briskly' " that he traveled 35 feet in " 'two and one-half to three seconds' "; (3) disregarding the defendant's statement that he was standing outside his own home; and (4) immediately questioning the defendant's legal status. (*Id.* at pp. 1111-1112.) In light of the officer's own testimony, the court was compelled to reject the trial court's finding that the officer " 'simply approached' " the defendant and " 'started to speak' " because that finding was not supported by substantial evidence. (*Id.* at p. 1112.) The officer's own testimony established that he "all but ran directly at [the suspect], covering 35 feet in just two and one-half to three seconds, asking defendant about his legal status as he did so." (*Ibid.*)

In *Roth*, one of two police officers in a patrol car shone a spotlight on the defendant and stopped the patrol car. Both officers got out, and one stood behind the patrol car door and told the defendant to approach in order to talk with him. The trial court denied the defendant's motion to suppress the evidence seized after the defendant

approached, although it found that a detention had occurred because the officer had issued a command to the defendant to approach him. The appellate court accepted the trial court's factual finding that a command had been given and therefore agreed that a detention had occurred because when the officer shone the spotlight, stopped the car, the deputies got out, and the deputies gave the command, a reasonable person would not believe himself or herself free to leave.

Thus, *Garry* and *Roth* do not support defendant's theory that he was detained when Officer Miller first contacted him in this case. Again, in *Garry*, undisputed evidence of police intimidation overrode the trial court's finding that a detention did not occur. And in *Roth*, the evidence that the officer had "commanded" the defendant to approach him supported the trial court's finding that a detention had occurred. Here, there is no evidence of police intimidation or command.

On this point, we find instructive *Perez*, *Franklin*, and *People v. Rico* (1979) 97 Cal.App.3d 124 (*Rico*).

In *Perez*, a police officer parked his patrol vehicle in front of a car occupied by two people. The officer left plenty of room for the car to leave. He shone his high beams and spotlights, but not his emergency lights, in order to get a better look at the occupants and gauge their reactions. The car's occupants slouched over in the front seat but did not otherwise respond to the lights. The officer walked to the car, tapped on the driver's side window with a lit flashlight, and asked the defendant to roll down his window. We found that "the conduct of the officer here did not manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention." (*Perez, supra*, 211 Cal.App.3d at p. 1496.)

In *Franklin*, a police officer spotted the defendant walking down the street in a seedy neighborhood at midnight wearing a coat that seemed too warm for the weather

conditions. When the officer put his patrol car's spotlight on him, the defendant tried to hide a white bundle he was carrying. The officer stopped his car directly behind the defendant and began to use his radio. The defendant then approached the car. The officer got out and met him in the area of the headlights. Without the officer's initiating any conversation, the defendant repeatedly asked, " 'What's going on?' " (*Franklin, supra*, 192 Cal.App.3d at p. 938.) The appellate court rejected the defendant's claim that he had been detained as a result of these actions. It observed that "the officer did not block appellant's way; he directed no verbal requests or commands to appellant. Further, the officer did not alight immediately from his car and pursue appellant. Coupling the spotlight with the officer's parking the patrol car, appellant rightly might feel himself the object of official scrutiny. However, such directed scrutiny does not amount to a detention." (*Id.* at p. 940.)

In *Rico*, a police officer was looking for a car carrying two persons suspected of having been involved in a shooting. The officer drove up beside a possible car and shone his spotlight into it to observe the occupants. Unable to see them, he dropped back behind the car and followed it without employing his emergency lights or otherwise trying to stop the car. After about five minutes, the car pulled over to the side of the road on its own. Noting that the officer had not tried to stop the car and that he only used his spotlight to get a better look at the occupants, the appellate court found that "[t]his momentary use of the spotlight and the notable absence of any additional overt action is . . . insufficient to be categorized as a detention . . . ." (*Rico, supra*, 97 Cal.App.3d at p. 130.)

In short, the evidence in this case is undisputed that Officer Miller's demeanor at the time of the encounter was not of the demanding or threatening variety. Officer Miller's questions were just that, questions rather than commands. Officer Miller did not physically or orally restrain defendant. And nothing he said or did indicated that he wanted to do anything more than talk to defendant. Thus, the evidence does not

demonstrate a show of authority other than what is implicit when a uniformed police officer exits a patrol car to engage a citizen. It therefore fails to support that Officer Miller coerced defendant to submit to questioning by means of physical force or a show of authority such that a reasonable person in defendant's situation would not have felt free to leave.

The magistrate properly denied defendant's motion to suppress.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Márquez, J.